IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 10, 2002 Session

STATE OF TENNESSEE v. JERRY WINFRED KEATHLY

Appeal from the Criminal Court for Dekalb County
No. 01-60F Lillie Ann Sells, Judge

No. M2002-00568-CCA-R3-CD - Filed May 21, 2003

A DeKalb County jury convicted the Appellant, Jerry Winfred Keathly,[1] of vehicular assault, a class D felony. After a sentencing hearing, the trial court imposed a four-year sentence, suspended after service of one year, followed by a probation period of six years. On appeal, Keathly challenges only the sentencing decision of the trial court, arguing that (1) the procedures for allocution were not properly followed, (2) his sentence was excessive, and (3) the trial court erred in denying full probation. After a review of the record, we conclude that Keathly was denied his statutory right of allocution. Tenn. Code Ann . § 40-35-210(b)(6) (Supp. 2002). Accordingly, Keathly's sentence is vacated, and the case is reversed and remanded for further proceedings consistent with the opinion.

Tenn. R. App. P. 3; Judgment of the Criminal Court Reversed and Remanded.

DAVID G. HAYES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and NORMA MCGEE OGLE, JJ., joined.

B. F. "Jack" Lowery, Lebanon, Tennessee, for the Appellant, Jerry Winfred Keathly.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; Kim R. Helper, Assistant Attorney General; William Edward Gibson, District Attorney General; and Anthony J. Craighead, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

On November 18, 2000, at 4:30 p.m., the Appellant was traveling on Highway 70 from his primary residence in Brentwood to his farm in Sparta. At the same time, the victim, Gary Herron,

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[1]The Appellant's name is spelled as it appears on the indictment; however, throughout the proceedings his last name appears Keathley. Our policy is to use the name as it appears on the indictment.

was traveling toward Smithville. Herron stopped behind Michael Cantrell's truck and trailer, which was signaling to turn left. The Appellant testified that he was "traveling about forty-five (45) miles an hour because there was construction on [his] left." He began to dial his wife on his cellular phone, when he "looked up to see the tailgate" of the victim's truck. He "hit his brakes to late to stop and rearended the truck." The force of the crash caused the victim to clip Cantrell's trailer and pushed his vehicle approximately one-hundred and fifty feet into a yard. Herron suffered a broken neck and injured spinal cord, resulting in a twenty-five percent permanent disability.

Amanda McDaniel witnessed the crash. She testified that, when the Appellant exited his vehicle, he "appeared drunk because he was staggering." She also testified that she could "smell the liquor on him" and "[h]e was stuttering."

Trooper Sherry Beaty responded to the accident scene. She testified that the Appellant "kept his head down, . . . appeared to be unsteady, . . . was stumbling, . . . spoke very low," and she "could smell alcohol on his breath." According to Trooper Beaty, when she went to the Appellant's vehicle to retrieve his registration papers, she noticed that "there was a plastic cup that had fallen over, . . . and there was an alcoholic beverage that had spilled in the floor." The Appellant initially refused a blood alcohol test; however, he then consented and was driven to DeKalb County Hospital. The Appellant's blood alcohol content was determined to be .09%. The Appellant stated that, two and one-half hours earlier, he consumed one gin and tonic before he left his home, but "judged [himself] to be sober enough to drive."

Following a trial by jury, the Appellant was convicted of vehicular assault and driving under the influence (DUI), second offense. The DUI conviction merged with the vehicular assault conviction. A sentencing hearing was conducted on January 25, 2002. The trial court imposed a sentence of four years, suspended after service of one year. The trial court also imposed a six-year probationary period and levied a fine of five thousand dollars. This timely appeal followed.

ANALYSIS

I. Allocution

At the conclusion of the sentencing hearing, the Appellant requested that he be allowed to read a statement to the trial court. The State objected, asserting that, in order to read a statement to the court, the Appellant must first be placed under oath and thus subject to cross-examination. The trial court agreed. After rejection of his request, the Appellant was placed under oath, read his statement to the court, and was rigorously cross-examined by the prosecutor and the trial judge. On appeal, he argues that this procedure denied him his statutory right of allocution.[2]

[2] Although not specifically assigned as an issue in his brief, *see* Tennessee Rule of Appellate Procedure 27(a)(4) (requiring the brief to include a statement of the issues presented for review), the Appellant repeatedly argues on appeal that:

(continued...)

Allocution has been defined "as the formality of the court's inquiry of a convicted defendant as to whether he has any legal cause to show why judgment should not be pronounced against him on the verdict of conviction." *State v. Stephenson*, 878 S.W.2d 530, 551 (Tenn. 1994) (citing BLACK'S LAW DICTIONARY 76 (6th ed. 1990)) (footnote omitted). It is "an unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence. This statement is not subject to cross-examination." BLACK'S LAW DICTIONARY 75 (7th ed. 1999); *see also United States v. Gilbert*, 244 F.3d 888, 924 (11th Cir. 2001).

Tennessee Code Annotated Section 40-35-210(b)(6) mandates that, in a non-capital case, a defendant be allowed allocution before a sentencing judge or jury. This section provides, "To determine the specific sentence and the appropriate combination of sentencing alternatives that shall be imposed on the defendant, the court shall consider . . . [a]ny statement the defendant wishes to make in the defendant's own behalf about sentencing." Tenn. Code Ann. § 40-35-210(b)(6) (Supp. 2002). Note 9 to this section, titled *Allocution*, states, "The trial judge, in determining the appropriate sentence . . ., shall consider, among several factors, any statement the defendant wishes to make in his own behalf about sentencing. . . ." Tenn. Code Ann. § 40-35-210 note 9 (1997) (citing *Stephenson*, 878 S.W.2d at 551). Based upon the foregoing, we conclude that the trial court erred by denying the Appellant his statutory right of allocution.

Next, we must determine whether the trial court's failure to comply with Tennessee Code Annotated Section 40-35-210(b)(6) constitutes reversible error. In doing so, we find the rationale of *United States v. Pagan*, 33 F.3d 125, 129-30 (1st Cir. 1994), which follows, persuasive.

> [W]hile we do not attach talismanic significance to any particular string of words, a defendant must at least be accorded the functional equivalent of the right.[3] And, moreover, functional equivalency should not lightly be assumed. Though there may be cases in which a defendant, despite the absence of the focused inquiry that the language of the rule requires, can be said to have received its functional equivalent, such cases will be few and far between. Doubts should be resolved in the defendant's favor.
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> To achieve functional equivalency (or, put another way, substantial compliance with the imperative of Rule 32 (a)(1)(C)), it is not enough that the sentencing court addresses a defendant on a particular issue, *see, e.g., United States*

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[2](...continued)
[I]t was grossly improper for the trial judge to consider [his] testimony at the sentencing hearing for the simple reason that the trial judge essentially forced the defendant to testify by denying him his statutory right of allocution. The defendant has an absolute right to make an unsworn statement of allocution, pursuant to Tenn. Code Ann. § 40-35-210(b)(6).

[3]Federal Rule of Criminal Procedure 32(a)(1)(c) requires the judge to "address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence."

v. Walker, 896 F.2d 295, 300-01 (8th Cir. 1990), affords counsel the opportunity to speak, *see, e.g., United States v. Posner*, 868 F.2d 720, 724 (5th Cir. 1989), or hears the defendant's specific objections to the presentence report, *see, e.g., United States v. Phillips*, 936 F.2d 1252, 1255-56 (11th Cir. 1991). Rather, the court, the prosecutor, and the defendant must at the very least interact in a manner that shows clearly and convincingly that the defendant knew he had a right to speak on any subject of his choosing prior to the imposition of sentence. *See Green v. United States*, 365 U.S. 301, 304-05, 81 S. Ct. 653 (1961).

We say "reversible" because, in this type of situation, we cannot dismiss the error as harmless. As early as 1689, the common law acknowledged that a court's failure to invite a defendant to speak before sentencing required reversal. *See United States v. Barnes*, 948 F.2d 325, 328 (7th Cir. 1991) (citing Anonymous, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K.B. 1689)). This axiom has survived the passage of time. It is settled that a failure to comply with the mandate of Rule 32(a)(1)(C) ordinarily requires vacation of the sentence imposed without a concomitant inquiry into prejudice. *See United States v. Maldonado*, 996 F.2d 598, 599 (2d Cir. 1993); *Barnes*, 948 F.2d at 332; *Phillips*, 936 F.2d at 1256; *Walker*, 896 F.2d at 301; *Posner*, 868 F.2d at 724; *United States v. Buckley*, 847 F.2d 991, 1002 (1st Cir. 1988), *cert. denied*, 488 U.S. 1015, 109 S. Ct. 808 (1989); *United States v. Navarro-Flores*, 628 F.2d 1178, 1184 (9th Cir. 1984); *cf. United States v. Miller*, 849 F.2d 896, 897-98 (4th Cir. 1988) (remanding for failure to meet strictures of Fed. R. Crim. P. 32(a)(1)(A) and (C)). This is so precisely because the impact of the omission on a discretionary decision is usually enormously difficult to ascertain.

In line with this virtually unbroken skein of authorities, we hold, that if the trial court fails to afford a defendant either the right of allocution conferred by Rule 32(a)(1)(C) or its functional equivalent, vacation of the ensuing sentence must follow automatically.

Id. (footnotes omitted). The *Pagan* court also noted, "This is not necessarily so, of course, when the sentence is the minimum possible." *Id.* at 130 n.5. Thus, courts have "undertaken harmless-error analysis in certain cases in which a defendant has been denied his right to allocution, limited, however, to instances in which a sentence is 'already as short as it could possibly be. . . .'" *Id.* (quoting *United States v. Carper*, 24 F.3d 1157, 1162 (9th Cir. 1994); *see also United States v. Ortega-Lopez*, 988 F.2d 70, 72-73 (9th Cir. 1993)).

In addition, we hold that reversible error may not always occur when, as here, a defendant is placed under oath and subjected to cross-examination. However, in the present the case, the error was not harmless. The Appellant was placed under oath and gave the following statement:

Thank you, Your Honor, for allowing me to address the Court at this time. I deeply regret all that has happened, which has brought me to this point. I honestly

never intended that my actions would result in bodily injury to anyone. This brings tremendous shame and embarrassment to me, since I have devoted my entire adult life to service to my country and its youth.

Growing up in this area, I joined the Scouts at age ten, going on to become an Eagle Scout. I was then employed as a full time professional executive by the Boy Scouts of America and served for the next thirty nine years. As a result of this case, I have had to take early retirement.

In addition to my work with the Scouts, I volunteered in the Reserve as a Naval Officer in 1964 and also retired this year as a Navy Captain. I spent twenty seven of those years in law enforcement as an NIS, Navy Investigative Service, holding top secret clearance and undergoing in depth background checks every five years.

Yes, Your Honor, I agree I should have known better. This has been a devastating lesson for me, but I have learned from it. I am determined it will never happen again.

After seeking professional counseling for my depression after the accident, I turned to the church for strength. I have improved my life orientation by not having one single drink of alcohol in fourteen months.

In retirement I plan to continue my life-long desire to give volunteer service to others. For the past eighteen years as Area Director for the Boy Scouts, I served one hundred thousand youth members per year in Tennessee, Kentucky and Georgia. I have tried my best to be a role model and a morally upright person. I have not had a chargeable accident in my BSA lease car on the job, even though I have driven more than one million miles visiting Boy Scout Councils.

The Court will find my driving record five years prior to this accident totally clean and I have driven forty thousand miles in the past fourteen months after the accident without a single incident or problem.

Again, I support the laws and the Court in Tennessee and appreciate Your Honor's objective consideration in this matter. I beg for understanding, mercy and compassion.

Thank you, Your Honor. I wrote this from my heart without the assist or additions from my attorneys.

The Appellant was then subjected to extensive cross-examination by both the State and the trial judge. The State inquired of the Appellant as follows:

Q. In this report you say I was dialing my wife on my wife on my phone, I looked and saw the tailgate of the truck, hit my brakes, rearended the truck correct?

A. That's correct.

Q. Before I left home two and half hours earlier, I had a drink of gin. So once again you're telling me here today, the reason that accident, that crash happened that night, was that because you were drinking, you were under the influence of alcohol or was it because you were trying to dial the phone? And I'll wait for your answer.

A. Possibly some of both.

Q. So we sit here today a year later, after a jury trial, after all of this, you're still not wanting to accept responsibility for your actions that night are you Mr. Keathley?

A. Oh, I have, I have done so, I did so in my statement.

Q. You're not willing to accept your responsibility as drinking alcohol causing that crash are you, Mr. Keathley?

A. I don't think that was the only factor.

Q. Was it a factor?

A. Possibly.

Q. Was it a contributing factor?

A. Possibly.

Q. Was possibly and possibly not, yet you're not wanting to accept responsibility are you, Mr. Keathley?

A. Yes, I have accepted responsibility.

Q. I have one more question for you, Mr. Keathley. I had Mrs. Grant here remind me and we both heard this, so I want you to tell me what you meant. After that trial and after the jury went out and everybody was walking out of the courtroom, when you were getting your stuff together, you made the statement they lied, they lied, they lied. Now did you make that statement, Mr. Keathley?

A. Not to you.

Q. Did you make that statement, Mr. Keathley?

A. Yes, to my attorney.

Q. And I heard it, cause you made it, right? Tell me here today, who lied Mr. Keathley?

A. The victim and the highway patrol.

Q. Trooper Batey lied under oath, is that your testimony here today?

A. It is, I can prove it.

Q. And victim –

A. I can prove that, also.

Q. Lied under oath?

A. They did.

Q. So when you said that, you were talking about a highway patrol officer and a man that had his neck broke, right?

A. Correct.

After the State finished questioning the Appellant and after a brief redirect by defense counsel, the following colloquy took place between the trial judge and the Appellant:

THE COURT: Mr. Keathley, you said, you said that the trooper here, you said that she lied and the victim lied in this case, did you know this trooper before this incident? Did you know the trooper before she investigated that case?

A. Not really, no.

THE COURT: Well either you did or you didn't.

A. I didn't know her personally, I knew of her.

THE COURT: All right.

A. I'm from, Sparta is home. I don't mean to be smart. This is my hometown and Smithville and Cookeville.

THE COURT: My question is did you know her at all? Did you know her?

A. Not personally.

THE COURT: All right. Why would she lie about you?

A. There's a number of reasons and I really don't want to get into them.

THE COURT: Well–

A. But I will if you, if you force me.

THE COURT: Well I'm asking you, you told me that she lied and I just, I was, why would you think that she lied?

A. I'd have to get to my file. Do you want to re-try the case or do you want to wait for another–

[DEFENSE COUNSEL]: Jerry, answer the Court's questions.

A. Okay.

[DEFENSE COUNSEL]: I think there was one point that he felt like, and he can testify, it was about the cup.

THE COURT: My question is, he says the officer lied about the investigation and I want to know why he thinks she lied.

A. It's very simple. . . . The night of the accident she wrote down a statement as to why she arrested me. It's a one paragraph statement, got it in my folder. When she came and testified, she changed her story completely. Other people other than–

THE COURT: Why did she do that? Why would she do that?

A. As I told you, there's three possible reasons. One, she might have been mad at one of my attorneys. Two, she got hit by a drunk driver herself and went on TV and went in the newspaper saying that she hated drunk drivers and that there were other victims and that she therefore was not objective about somebody that was in an accident because of her own personal (sic). And she was also tied up with these two

because she wanted them to help her on her case and it's all balled up in DeKalb County politics and I'm getting the squeeze in the middle.

There is a third one, the, give me just a minute, there's another reason. . . .

[DEFENSE COUNSEL]: Your Honor, we would like to call a recess to confer with our client. . . .

THE COURT: All right. You've consulted with your attorneys, did you want to tell me the third reason then? . . .

A. Back in the first part when this first, when we first started trying to deal with this and we went to court back in April, the Trooper Batey was willing to let me plea for driving while impaired and she had worked with the D.A. and we had it going and she felt, she said then that she would not have known that I had been drinking if I hadn't told her. And both, both Judge Hilton and Judge Vester Parsley also know this, that she made that statement.

I have a copy of the letter where she was interviewing with the TV channel and the newspaper–

[THE STATE]: Your Honor, I would object to the hearsay.

THE COURT: Well I think I've kind of got the crux of that statement and I understand, you think because she, did you say that she had been involved in a previous accident herself, is that–

A. It was after my accident. . . . She had one and she went on TV and in the paper and her statements in here shows that she cannot be objective. If you were going to put her on the witness stand, I mean as a jury person, you would have had to dismiss her as a jury person.

Thereafter, the trial court further inquired of the Appellant why he believed the victim and the eyewitness lied. This type of questioning was prejudicial to the Appellant. As the record reflects, the Appellant's responses were so detrimental to his case that defense counsel asked for a recess to talk with the Appellant. Furthermore, the trial court greatly emphasized the Appellant's testimony in denying probation. For example, the trial court stated:

. . . But this defendant, it is my opinion, it is my finding that this defendant believes that this was not his fault. He's verbalized that here today. It is clear to me based on what I got from him that it's somebody elses fault. Everybody was lying in this case, the trooper was lying for these reasons that he put on the record here today. The little twenty year old female that testified, had nothing to do with it, although he wouldn't

> say and call her a liar to the Court, she, it wasn't that way, how could she be close enough to him, she wasn't within ten feet, to smell this stuff, to smell this alcohol on him. He's not taken responsibility, even went so far as to say the victim in this case lied.

The trial court's reliance on the Appellant's testimony in fashioning his sentence was impermissible. Before imposition of his sentence, the Appellant should have been permitted to make an unsworn statement to the court without having been subjected to rigorous cross-examination. Accordingly, we conclude, as plain error, that the Appellant was denied his statutory right of allocution and, therefore, his sentence must be vacated and remanded for a new sentencing hearing.

II. Sentencing

For instructional purposes upon remand, we proceed to examine the length and manner of service of the Appellant's sentence. When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Ashby*, 823 S.W.2d at 169. When conducting a *de novo* review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the Appellant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (1997); *Ashby*, 823 S.W.2d at 168. Furthermore, we emphasize that facts relevant to sentencing must be established by a preponderance of the evidence and not beyond a reasonable doubt. *State v. Winfield*, 23 S.W.3d 279, 283 (Tenn. 2000) (citing *State v. Poole*, 945 S.W.2d 93, 96 (Tenn. 1997)).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and made findings of fact that are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. *State v. Fletcher*, 805 S.W4.2d 785, 789 (Tenn. Crim. App. 1991). However, where the trial court fails to comply with the statutory provisions of sentencing, appellate review is *de novo* without a presumption of correctness.

A. Length

The Appellant contends that "the trial court erroneously relied upon inappropriate enhancement factors and thus the sentence of four years is excessive." Because the Appellant is a range I standard offender, the range of punishment for vehicular assault, a class D felony, is "not less

than two (2) years nor more than four (4) years." Tenn. Code Ann. § 40-35-112(a)(4) (1997). Furthermore, the presumptive sentence would be the minimum sentence in that range if there are no enhancing or mitigating factors present. Tenn. Code Ann. § 40-35-210(c). If there are both enhancing and mitigating factors present, the trial court must "enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence within the range as appropriate for the mitigating factors." Tenn. Code Ann. § 40-35-210(e).

In determining the Appellant's sentence, the trial court applied the following enhancement factors: (1) The Appellant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; (3) The offense involved more than one victim; and (10) The Appellant had no hesitation about committing a crime when the risk to human life was high. Tenn. Code Ann. § 40-35-114(1), (3), (10) (1997).[4]

The Appellant first contends that enhancement factor (1) was misapplied because a prior DUI conviction is an essential element of vehicular assault as charged in this case. Enhancement factors may not be applied if the factors are "themselves essential elements of the offense as charged in the indictment." Tenn. Code Ann. § 40-35-114 (Supp. 2002). Specifically,

> [t]he Appellant submits that the legislature considered a driver's prior conviction for DUI as a sentence enhancer when it decreased the presumptive level of intoxication and impairment from ten-hundredths of one percent (.10%) or more by weight of alcohol to eight-hundredths of one percent (.08%) of more by weight of alcohol. *See* T.C.A. § 55-10-408. But for the Appellant's prior DUI conviction, there would have been no presumption of intoxication under the current statutory scheme. It was in fact his prior DUI conviction that lowered the threshold or presumption from that of .10% to .08% causing this criminal action to be commenced.
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> Pursuant to Tennessee Code Annotated § 39-13-106(a) (Supp. 2002):
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> A person commits vehicular assault, who, as the proximate result of the person's intoxication as set forth in § 55-10-401, recklessly causes serious bodily injury to another person by the operation of a motor vehicle. For purposes of this section, "intoxication" includes alcohol intoxication as defined by § 55-10-408, drug intoxication, or both.

Accordingly, the elements of vehicular assault are: (1) operation of a motor vehicle; (2) while under the influence of an intoxicant; (3) recklessly inflicting serious bodily injury to another person; and (4) the victim was injured as a proximate result. *State v. Williamson*, 919 S.W.2d 69, 75 (Tenn. Crim. App. 1995) (citing Tenn. Code Ann. § 39-13-106(a)). Evidence of alcohol intoxication can be proven by reference to Section 55-10-401 or Section 55-10-408. Tennessee Code Annotated

[4] We note that because of recent renumbering of the enhancements factors under Tennessee Code Annotated Section 40-35-114, the correct enhancement numbers are now (2), (4), and (11).

Section 55-10-408 (Supp. 2002), titled, Tests for alcoholic or drug content – Presumptions of intoxication and impairment, provides:

> (a) For the purpose of proving a violation of § 55-10-401(a)(1), evidence that there was, at the time alleged, ten-hundredths of one percent (.10%) or more by weight of alcohol in the defendant's blood shall create a presumption that the defendant's ability to drive was sufficiently impaired thereby to constitute a violation of § 55-10-401(a)(1).
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> (b) Evidence that there was, at the time alleged, eight-hundredths of one percent (.08%) or more by weight of alcohol in the defendant's blood shall create a presumption that the defendant was under the influence of such intoxicant, and that the defendant's ability to drive was impaired thereby, sufficiently to constitute a violation of § 55-10-401(a)(1). The provisions of this subsection only apply if the defendant has been convicted one (1) or more times of violating the provisions of § 55-10-401.

If a defendant was previously convicted of driving under the influence, then the presumption of intoxication may be lowered for .10% to .08%.[5] Thus, the issue in a prosecution for DUI under the *per se* provisions of section (b) is not whether the person is "under the influence," typically a subjective determination, but whether that person's blood or breath alcohol concentration while driving was eight-hundredths of one (.08%) percent based upon reliable testing.

In the present case, the Appellant's blood alcohol concentration was .09%, and the Appellant was convicted of DUI in 1993. In order to show intoxication, as required for a vehicular assault conviction, the State relied upon the Appellant's prior conviction to reduce the presumptive level of intoxication to .08%. Accordingly, the prior DUI conviction became a necessary element of the offense. *State v. Jones*, 883 S.W.2d 597, 601 (Tenn. 1994) (the test for determining if an enhancement factor is an essential element of an offense is whether the same proof necessary to establish the enhancement factor would also establish an element of the offense). Based upon the foregoing, we conclude that application of enhancement factor (1) was improper.

The trial court applied enhancement factor (3), the offense involved more than one victim, to the Appellant's conviction. The Appellant, citing *State v. Imfeld*, 70 S.W.3d 698, 706 (Tenn. 2002), contends that application of this factor was inappropriate because "there cannot be multiple victims for any one charge referring to a particular named person." This court has defined "victim," as used in Tennessee Code Annotated Section 40-35-114(3), as being limited in scope to a person or entity that is injured, killed, had property stolen, or had property destroyed by the perpetrator of

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[5] If a defendant's blood and breath alcohol concentration is .10% or higher, then it would not be necessary to employ the lower presumption of section (b). Additionally, if a defendant's criminal history includes more than one DUI, then enhancement factor could be applied because only one prior conviction is necessary to lower the presumptive level of intoxication.

the crime. *State v. Raines*, 882 S.W.2d 376, 384 (Tenn. Crim. App.), *perm. to appeal denied*, (Tenn. 1994). This court has also held that factor (3) may not be applied to enhance a sentence when the Appellant is separately convicted of the offenses committed against each victim. *State v. Freeman*, 943 S.W.2d 25, 31 (Tenn. Crim. App. 1996), *perm. to appeal denied*, (Tenn. 1997); *State v. Williamson*, 919 S.W.2d 69, 82 (Tenn. Crim. App. 1995) (citations omitted). Additionally, our supreme court has held that there cannot be multiple victims for any one offense where the indictment specifies a named victim. *Imfeld*, 70 S.W.3d at 698. Because the Appellant was convicted of an offense involving a specifically named victim in the indictment for vehicular assault, the trial court improperly applied enhancement factor (3) during sentencing to his conviction.

Regarding enhancement factor (10), no hesitation about committing a crime when the risk to human life was high, the Appellant argues that this factor "does not apply because there is no evidence in the record that anyone other than the victim was subject to being injured by the Appellant." In so applying this factor, the trial court concluded that:

> The defendant again under the facts of this case posed a great risk to human lives in this situation by getting out on our roadways, getting drunk, driving and running through innocent men and women who were out there in evening traffic going home from work as was indicated from this victim. So he posed not only to this victim, but in looking at other people out there, the people on the roadway, that was testified in trial, there was proof that was put into the record of the long line of traffic there and the construction and number of people. It was a busy time of the evening, it wasn't a time when there wasn't any traffic out. So therefore the Court finds that these enhancement factors have been proven in this case as well.

Enhancement factor (10) may be applied in circumstances where individuals other than the victim are in the area of the Appellant's criminal conduct and are subject to injury. *State v. Sims*, 909 S.W.2d 46, 50 (Tenn. Crim. App. 1995) (citation omitted) (distinguished on other grounds). Notwithstanding, in *State v. Rhodes*, 917 S.W.2d 708, 714 (Tenn. Crim. App. 1995), this court held that enhancement factor (10) does not apply to vehicular assault where the record does not indicate that any other person was actually threatened by the Appellant's driving because "vehicular assault [unquestionably] reflects the legislature's appreciation of the substantial risk of and actual degree of harm that results from DUI caused injury." *Id.*

While the trial court's rationale does not indicate that any other person was actually threatened by the Appellant's driving, we find that the record sufficiently corroborates the application of enhancement factor (10). When the Appellant collided with the victim's vehicle, the victim's vehicle "clipped" the trailer in front of him. The trailer was attached to Michael Cantrell's truck. Clearly, Cantrell was in danger due to the Appellant's driving. This factor was properly applied. Upon remand, the trial court shall determine the appropriate weight to be given this factor.

Upon *de novo* review, the State asserts that application of Tennessee Code Annotated Section 40-35-114(6),[6] the personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great, is appropriate, "not based on the injuries suffered by the defendant, but based upon the damage to the victim's truck." In *State v. John D. Neblett*, No. 01C01-9805-CC-00231 (Tenn. Crim. App. at Nashville, Sept. 24, 1999), *perm. to appeal denied*, (Tenn. 2001), this court upheld the trial court's application of enhancement factor (6) where a vehicular assault victim's car was totaled during the wreck. There is no proof in the record concerning the amount of the victim's property loss resulting from the collision, *i.e.*, the condition or worth of the victim's 1990 black Ford pickup. The State, upon remand, must provide proof of "particularly great" property loss to support application of this factor.

B. Probation

Next, the Appellant argues that the trial court erroneously denied full probation. Because the Appellant was convicted of a class D felony, he is entitled to the presumption that he is a favorable candidate for alternative sentencing. Tenn. Code Ann. § 40-35-102(6) (1997). With certain statutory exceptions, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(b). However, a defendant has the burden of establishing his suitability for full probation, even if the defendant is entitled to the statutory presumption of alternative sentencing. *State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App.), *perm. to appeal denied*, (Tenn. 1995), *overruled on other grounds, State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000); *see also Boggs*, 932 S.W.2d 467, 477 (Tenn. Crim. App.), *perm. to appeal denied*, (Tenn. 1996).

To meet the burden of establishing suitability for total probation, an appellant must demonstrate that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *Bingham*, 910 S.W.2d at 456. When deciding suitability for probation, although not controlling, the sentencing court should use the following criteria: (1) the nature and circumstances of the criminal conduct involved, Tennessee Code Annotated § 40-35-210(b)(4); (2) the defendant's potential or lack of potential for rehabilitation, including the risk that during the period of probation the defendant will commit another crime, Tennessee Code Annotated § 40-35-103(5) (1997); (3) whether a sentence of full probation would unduly depreciate the seriousness of the offense, Tennessee Code Annotated § 40-35-103(1)(B); and (4) whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes, Tennessee Code Annotated § 40-35-103(1)(B). *Bingham*, 910 S.W.2d at 456. Denial of probation may be based solely upon the circumstances of the offense when they are of such a nature as to outweigh all other factors favoring probation. *Fletcher*, 805 S.W.2d at 788-89.

The proof introduced at the sentencing hearing established that the Appellant was sixty years old, had been married for thirty-seven years, and had a twenty-five-year-old son. The Appellant

[6] Again we note that because of recent renumbering of the enhancement factors under Tennessee Code Annotated § 40-35-114, the correct enhancement number is now (7).

stated that "his past and present relations are good, loving and strong. My wife and son are supportive." Furthermore, he graduated from Tennessee Technological University in 1963 with a bachelors degree and was then employed by the Boy Scouts of America for the next thirty-nine years. Beginning in 1965, he also served as a captain in the United States Naval Reserve and retired honorably in 1993. At the sentencing hearing, the Appellant, reading from his prepared statement, testified that he sought professional counseling for his depression after the accident, had not had "one single drink of alcohol in fourteen months," and had "turned to the church for strength." An insurance settlement, in the amount of two-hundred and fifty thousand dollars, was reached with the victim. This amount has been paid in full and, therefore, a long probationary period is not necessary for the purpose of ensuring restitution. The Appellant's prior criminal history consists of a single DUI conviction in 1993, for which the Appellant received forty-eight hours of jail time. A single, ten-year-old alternative sentence does not show that measures less restrictive than confinement have frequently, recently, and unsuccessfully been applied to the Appellant. Finally, the Appellant, who suffers from coronary artery disease, underwent bypass surgery in 1991. His primary care physician recommends "that Mr. Keathley's health needs be considered when making a decision regarding possible incarceration."

Additionally, the trial court, in denying probation, placed great weight on the Appellant's testimony at the sentencing hearing and, as previously concluded, this was inappropriate. Although the issue of alternative sentence is pretermitted by our remand for resentencing, we, nonetheless, note that some type of alternative sentence is justified and a six-year probationary period appears to be excessive under the facts of this case. The particular manner of sentence, whether it be full probation or some other type of alternative sentence, is a determination for the trial court upon remand.

CONCLUSION

Based upon the foregoing, we conclude that the Appellant was denied his statutory right of allocution. Furthermore, given the prejudicial nature of the information elicited by the State and the trial judge, we, consequently, remand this case for transfer to another judge for purposes of conducting a new hearing in accordance with sentencing principles and this opinion.

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DAVID G. HAYES, JUDGE